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Sahri Tahe v Public Prosecutor and other appeals

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS M-05–91–04 OF 2014, M-05–92–04 OF 2014 AND M-05–93–04 OF 2014
MOHTARUDIN BAKI, ZAKARIA SAM AND AHMADI ASNAWI JJCA
22 MARCH 2016

C

Evidence — Common intention, evidence of — Whether conduct of accused did not suggest they were merely on hired mission to assault victim — Whether admission by accused that they bound victim's hands and feet and wrongly confined him taken together with ransom demand made to victim's wife established their D *common intention to abduct victim for ransom — Whether prosecution's failure to secure attendance of foreigner about whom no information was available not fatal and did not warrant adverse inference being invoked against prosecution*

The High Court sentenced each of the three appellants, Sahri Tahe, Purwanto E and Didik Setiawan – all Indonesian nationals who had come to Malaysia to seek employment – to life imprisonment and 15 strokes of the *rotan* for abducting and illegally confining a businessman, PW9, for ransom. The offence, punishable under s 3(1) of the Kidnapping Act 1961, was read together with s 34 of the Penal Code. According to the prosecution's evidence, F PW9, who was in the business of mechanical engineering, received several telephone calls from a person, who later turned out to be Didik Setiawan, requesting him to come to a building construction site to look into the proposed installation of a fire-fighting system. When PW9 arrived at the site and was taken to the third floor of an abandoned building, the appellants, G armed with sticks, surrounded him and after assaulting PW9, they bound his hands and covered his eyes and mouth with masking tape, tied up his legs and confined him in a toilet before leaving. Minutes later, Purwanto returned alone to stand guard over PW9 until the evening of the following day when, after several attempts by PW9 to offer Purwanto money to release him, Purwanto H agreed to do so if PW9 paid him RM20,000. Purwanto went with PW9 in his car back to the latter's office to collect the money. Meanwhile, PW9's wife, PW8, had received telephone calls to pay RM500,000 for PW9's release. She managed to negotiate the sum down to RM300,000. After lodging a police report and while awaiting instructions on where she was to drop off the money, I PW8 received a call from PW9 saying he had already been released by Purwanto. Police, meanwhile, arrived at PW9's office and arrested Purwanto and based on information that he gave Sahri Tahe and Didik Setiawan were later arrested. Finding that the prosecution had established a prima facie case, the trial court ordered the appellants to make their defence. All three appellants

admitted that they assaulted, bound and confined PW9 at the said building but denied that they did it for ransom. They claimed they were hired by one Ah Thiam to assault PW9 because the latter allegedly owed Ah Thiam money. The trial judge rejected the defence ruling it to be a bare denial concocted to shift blame onto Ah Thiam. The court found there was no evidence to link Ah Thiam to the kidnapping. In their instant appeal against conviction and sentence, the appellants reiterated that they did not confine PW9 for ransom; that there was no evidence to suggest any of them had demanded ransom money; that the telephone number recorded on PW8's cellphone was registered in the name of another Indonesian person ('Sularo') and that because the investigating officer, PW28, confirmed at trial that a person named Sularo had indeed entered Malaysia at the material time, the prosecution's failure to locate and produce Sularo as a witness was fatal to its case and required adverse inference under s 114(g) of the Evidence Act 1950 to be invoked against the prosecution.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) If the intention of the appellants was only to assault PW9 as instructed by their paymaster, there was no need for them to have wrongfully confined PW9 at the abandoned building after assaulting him, which was then followed with a ransom demand to PW8 to secure PW9's release. They should have just left or allowed PW9 to go after they were done with him. However, the appellants proceeded to bind PW9's hands and feet, plaster his mouth and eyes, drag him into the toilet and have Purwanto stand guard over him until PW9's release the following evening. It was apparent that from the very beginning, the conduct of the three appellants did not suggest that they were merely on a hired mission to assault PW9 (see paras 35–36).

(2) The court agreed with the trial judge's finding that the three appellants had indeed participated and were acting in concert to further their common intention, to wit, the wrongful confinement of PW9 with intent to ransom. Clearly, there was a demand for ransom made by the appellants who had acted in concert pursuant to a pre-arranged plan in furtherance of that common intention within the four walls of s 34 of the Penal Code (see paras 39 & 42).

(3) PW28 had only the telephone number and information that an Indonesian named Sularo had entered the country. No other particulars were available. Even the appellants did not allude to the existence of Sularo in their defence. As such, PW28 was not expected to go looking for Sularo in the absence of further particulars relevant to his investigation. Under the circumstances, the prosecution was never in a position to procure Sularo's attendance in court and his non-production was not deliberate or unfair but on account of the failure to locate and

A subpoena him. It was not a withholding or suppression of evidence and there was no justification to warrant s 114(g) to be invoked against the prosecution (see paras 46–47).

(4) Sularo was not material for the prosecution to establish its case. As long as PW8 and PW9 were able to give evidence of the transaction, to wit, the wrongful confinement of PW9 with intent to ransom, there was no reason for Sularo to be called or why any presumption had to be invoked that if he had been produced his evidence would have been against the prosecution. Additionally, there was PW28's unchallenged testimony that his investigation revealed that the telephone calls to PW8 demanding the ransom sum were in fact made by the first appellant (see paras 48–49).

(5) The court agreed with the trial court's findings that there was no evidence to link Ah Thiam to the offence in question. The evidence revealed that Ah Thiam was implicated only in the assault of PW9 and nothing more (see paras 50–51).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menghukum setiap daripada tiga perayu, Sahri Tahe, Purwanto and Didik Setiawan – kesemuanya warga Indonesia yang telah datang ke Malaysia untuk mencari pekerjaan – penjara seumur hidup dan 15 sebatan rotan kerana menculik dan mengurung secara tidak sah seorang ahli perniagaan, PW9, untuk mendapat wang tebusan. Kesalahan itu, yang boleh dihukum di bawah s 3(1) Akta Penculikan 1961, telah dibaca bersama s 34 Kanun Keseksaan. Menurut keterangan pendakwaan, PW9, yang menjalankan perniagaan kejuruteraan mekanikal, telah menerima beberapa panggilan telefon daripada seseorang, yang kemudian dikenali sebagai Didik Setiawan, yang memintanya datang ke bangunan tapak pembinaan untuk melihat cadangan pemasangan sistem memadam kebakaran. Apabila PW9 tiba di tapak itu dan telah dibawa ke tingkat tiga bangunan yang ditinggalkan itu, perayu-perayu, yang bersenjatakan kayu, mengelilinginya dan selepas menyerang PW9, mereka mengikat tangannya dan menutup mata dan mulutnya dengan pita pelekat, mengikat kakinya dan mengurungnya dalam tandas sebelum meninggalkan tempat itu. Beberapa minit kemudian, Purwanto kembali sendiri untuk menjaga PW9 sehingga petang hari berikutnya apabila, selepas beberapa percubaan oleh PW9 menawarkan Purwanto wang untuk membebaskannya, Purwanto bersetuju untuk berbuat demikian jika PW9 membayarnya RM20,000. Purwanto telah pergi dengan PW9 dengan keretanya balik ke pejabat PW9 untuk mengutip wang itu. Sementara itu, isteri PW9, PW8, telah menerima panggilan telefon untuk membayar RM500,000 bagi pembebasan PW9. Dia berjaya untuk berunding mengurangkan jumlah itu kepada RM300,000. Selepas membuat laporan polis dan sementara menunggu arahan di mana dia perlu meninggalkan wang itu, PW8 telah menerima panggilan daripada PW9 mengatakan dia telahpun

dibebaskan oleh Purwanto. Polis, pada masa itu, telah tiba di pejabat PW9 dan menangkap Purwanto dan berdasarkan maklumat bahawa dia telah diberikannya Sahri Tahe dan Didik Setiawan yang kemudian telah ditangkap. Setelah mendapati bahawa pendakwaan telah membuktikan kes prima facie, mahkamah perbicaraan telah memerintahkan perayu-perayu membuat pembelaan mereka. Ketiga-tiga perayu telah mengakui bahawa mereka telah menyerang, mengikat dan mengurung PW9 di bangunan tersebut tetapi menafikan bahawa mereka melakukannya untuk wang tebusan. Mereka mendakwa mereka telah diupah oleh Ah Thiam untuk menyerang PW9 kerana PW9 dikatakan berhutang wang dengan Ah Thiam. Hakim perbicaraan telah menolak pembelaan dengan memutuskannya sebagai penafian asas yang direka-reka untuk beralih menyalahkan Ah Thiam. Mahkamah mendapati tiada keterangan untuk mengaitkan Ah Thiam dengan penculikan itu. Dalam rayuan mereka ini terhadap sabitan dan hukuman, perayu-perayu menyatakan semula bahawa mereka tidak mengurung PW9 kerana wang tebusan; bahawa tiada keterangan untuk mencadangkan mana-mana daripada mereka telah menuntut wang tebusan; bahawa nombor telefon yang direkodkan dalam telefon bimbit PW8 didaftarkan atas nama orang Indonesia lain ('Sularo') dan bahawa oleh kerana pegawai siasatan, PW28, telah mengesahkan semasa perbicaraan bahawa seorang bernama Sularo sememangnya telah memasuki Malaysia pada masa matan, kegagalan pendakwaan untuk mencari dan mengemukakan Sulari sebagai saksi telah memudaratkan kesnya dan menghendaki inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 untuk digunakan terhadap pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Jika niat perayu-perayu hanya untuk menyerang PW9 sebagaimana diarahkan oleh pembayar mereka, tiada keperluan untuk mereka mengurung secara salah PW9 di bangunan yang ditinggalkan selepas menyerangnya, yang diikuti dengan tuntutan wang tebusan kepada PW8 untuk menjamin pembebasan PW9. Mereka sepatutnya telah meninggalkan sahaja atau membenarkan PW9 untuk pergi selepas mereka telah selesai dengannya. Walau bagaimanapun, perayu-perayu terus mengikat tangan dan kaki PW9, melekap pelekat pada mulut dan matanya, mengheretnya ke dalam tandas dan menyuruh Purwanto menjaganya sehingga PW9 dibebaskan petang berikutnya. Ia adalah jelas bahawa dari mula lagi, perlakuan tiga perayu tidak mencadangkan bahawa mereka hanya diupah untuk misi menyerang PW9 (lihat perenggan 35–36).

(2) Mahkamah bersetuju penemuan hakim perbicaraan bahawa tiga perayu sememangnya terlibat dan bertindak bersama untuk meneruskan niat bersama mereka, iaitu, pengurungan secara salah PW9 dengan niat mendapat wang tebusan. Adalah jelas, terdapat tuntutan untuk wang tebusan yang dibuat oleh perayu-perayu yang telah bertindak bersama

menurut rancangan yang telah diatur sebelumnya bagi meneruskan niat bersama tersebut dalam maksud s 34 Kanun Keseksaan (lihat perenggan 39 & 42).

(3) PW28 hanya mempunyai nombor telefon dan maklumat bahawa seorang Indonesia bernama Sulari telah memasuki negara. Tiada butiran lain yang tersedia. Malah perayu-perayu tidak menggambarkan kewujudan Sularo dalam pembelaan mereka. Oleh itu, PW28 tidak dijangka telah pergi mencari Sularo dalam ketiadaan butiran selanjutnya yang relevan dengan siasatannya. Di bawah keadaan itu, pendakwaan bukan dalam kedudukan untuk mendapatkan kehadiran Sularo di mahkamah dan ketidakhadirannya bukan disengajakan atau tidak adil tetapi atas kegagalan untuk mencari dan mensupinanya. Ia bukan keterangan yang ditahan atau disembunyikan dan tiada justifikasi untuk mewajarkan s 114(g) digunakan terhadap pendakwaan (lihat perenggan 46–47).

(4) Sularo bukan penting untuk pendakwaan membuktikan kesnya. Selagi PW8 dan PW9 mampu memberikan keterangan tentang transaksi itu, iaitu, pengurungan secara salah PW9 dengan niat mendapat wang tebusan, tiada sebab untuk Sularo dipanggil atau kenapa apa-apa andaian telah digunakan bahawa jika dia dikemukakan keterangannya adalah bertentangan dengan pendakwaan. Tambahan pula, keterangan PW28 yang tidak dicabar bahawa siasatannya mendedahkan yang panggilan telefon kepada PW8 menuntut wang tebusan sememangnya dibuat oleh perayu pertama (lihat perenggan 48–49).

(5) Mahkamah bersetuju dengan penemuan mahkamah perbicaraan bahawa tiada keterangan untuk mengaitkan Ah Thiam dengan kesalahan yang dipersoalkan. Keterangan itu mendedahkan bahawa Ah Thiam terlibat hanya dalam menyerang PW9 dan tidak lebih daripada itu (lihat perenggan 50–51).]

Notes

For a case on common intention, evidence of in general, see 7(1) *Mallal's Digest* (5th Ed, 2015) para 1149.

Cases referred to

Hari Ram v State of Uttar Pradesh (2004) 3 LRI 523, SC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Legislation referred to

Evidence Act 1950 ss 114, 114(g)
Penal Code s 34

Appeals from: Criminal Trial No 45C-2 of 2011 (High Court, Melaka)

Aina Safie Azami (Gooi & Azura) for the appellant.
Mangai Kalairasi (Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] ALL the three appeals were heard together before us. The appellant in Criminal Appeal No M-05–91–04 of 2014 is hereinafter known as the first appellant, the appellant in Criminal Appeal No M-05–92–04 of 2014 is known as the second appellant and the appellant in Criminal Appeal No M-05–93–04 of 2014 is known as the third appellant.

[2] The three appellants were jointly charged with the following offence before the High Court in Melaka:

> Bahawa kamu bersama-sama pada 12/04/2010 jam lebih kurang 4.45 petang, di alamat Bangunan Kiara Apartment, Taman Mutiara, Melaka Baru, Batu Berendam, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka, telah dengan niat hendak membuat tebusan, mencolek seorang lelaki Cina bernama Gun Song Huat (No K/P: 661223-04-5221) serta mengurung lelaki tersebut dengan salah sehingga wang tersebut sebanyak RM300,000.00 diperolehi dari isteri mangsa iaitu Liaw Siew Lan (No K/P: 710509-04-5188). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 3(1) Akta Culik, 1961, (Akta 365) dan dibaca bersama-sama seksyen 34, Kanun Keseksaan.

[3] At the conclusion of the trial, all the three appellants were found guilty and convicted of the offence and each were respectively sentenced to life imprisonment and fifteen strokes of the *rotan*.

[4] The appeals before us were in respect of the said convictions and sentences. We dismissed the appeals after due consideration of the issues raised and the submissions articulated in support thereof by the parties herein and affirmed the convictions and sentences handed down by the High Court. Here are our grounds.

THE CASE FOR THE PROSECUTION

[5] The victim, PW9 (Gun Song Huat), was a contractor, specialising in mechanical engineering and had been running his business for almost 20 years under the trade name of Gan Brothers Construction, operating from No 29, Jalan MJ58, Taman Merdeka Jaya, Melaka. He was assisted by his wife, PW8 (Liaw Siew Lan), in the management of the said business, in particular the accounts of the firm.

[6] On the day in question (12 April 2010) at about 9.30am, PW9 received a telephone call from one whom he believed to be one of his customers, informing him that his employer wanted to construct a hotel at Batu Berendam and required PW9's expertise to look into the firefighting system. PW9 declined the caller's request to visit the site, which was located not far from Public Bank, Batu Berendam, for an inspection.

[7] However, after numerous telephone calls throughout the day from the same caller, he relented. PW9 arrived at Batu Berendam at about 4pm. He parked his car in front of a restaurant and made a telephone call to the same caller and informed the caller that he had arrived. Then he saw a male Indonesian walking towards him. The Indonesian was talking over his handphone, upon arrival, the Indonesian told him that he was the caller who had been calling him. PW9 identified this Indonesian as the third appellant.

[8] PW9 immediately asked for the drawing plans but was told that the same was at the construction site. The third appellant then invited PW9 to the site. It was located about 300 metres away.

[9] Upon arrival at the site which was actually an abandoned building, the third appellant took PW9 to the third floor, At the third floor, the third appellant however, turned back and proceeded to block the stairway. He was now armed with a meter long stick, Two other Indonesians then emerged from two directions, one from his front and the other from his rear. Both of them were later identified by PW9 as the first and second appellant. Both were also armed with about a meter long sticks. PW9 was effectively surrounded by the three men.

[10] The three appellants then begun assaulting PW9 with the sticks when PW9 started to ask questions. He was hit on his head, hands, legs and on his back. They caught him when he fell on the floor. Next they bound his hands with cellophane tapes and his legs with ropes. His mouth and eyes were also plastered with cellophane tapes. He was finally dragged and placed inside a toilet. His purse, bunch of keys and hand phone were also taken by them from his pockets. Thereafter he was left alone.

[11] About 15 minutes later PW9 heard footsteps. He felt someone standing guard over him. The second appellant was later identified by PW9 as the person who stood guard. He was kept in that position throughout the night until the next day (13 April 2010). At one point he managed to push the cellophane tapes covering his mouth and asked for the time. He was told that it was 11pm.

[12] The next morning (13 April 2010) PW9 again asked for the time and was told it was 9am. He offered RM20,000 and later increased it to RM40,000 to the second appellant to release him but was told to shut up. However, PW9 was persistent with his offers and pleas. He testified at pp 115–116, *Jld* I, rekod rayuan ('RR'):

> A: Orang yang menjaga saya itu menjawab dia perlu tunggu kerana dia nak pastikan berapakah jumlah partner dia dapat daripada keluarga saya. Dia minta saya jangan buat tawaran dahulu. Saya dengar orang yang jaga saya itu kerap membuat panggilan telefon pada kawan-kawannya. Saya menawarkan lagi jumlah RM80,000.00 untuk melepaskan saya.
>
> A: Selepas itu saya dapat tahu daripada orang yang jaga saya bahawa wang tebusan yang diminta adalah RM500,000.00. Saya telah beritahu dia bahawa isteri saya tidak akan dapat cari wang sebegitu banyak. Saya minta dia lepaskan saya supaya saya boleh balik dan aturkan wang. Dia beri jawapan yang sama dan minta saya diam.
>
> A: Pada pukul 3.30 petang oleh sebab badan saya rasa sakit sekali lagi saya telah menawarkan jumlah RM40,000.00 dibayar kepada penjaga. Lelaki yang jaga saya beritahu sekiranya partner saya tidak memberi bahagiannya kepadanya dia akan terima tawaran RM40,000.00 untuk melepaskan saya.
>
> Q: Apa berlaku selepas itu?
>
> A: Selepas itu badan saya agak letih dan saya tertidur dan saya dikejutkan pada jam lebih kurang 6.00 petang. Ditanya sama ada apa yang saya katakan akan ditunaikan. Ketika itu saya kata saya akan tunaikan memandangkan keadaan saya yang lemah ketika itu.
>
> Q: Bila kamu cakap begitu, apakah penjaga buat?
>
> A: Selepas itu penjaga telah secara ikhlas beritahu saya dia hanya minta wang RM20,000.00 dan minta saya beritahu isteri saya jangan beri wang kepada partner dia.
>
> Q: Lepas itu apa dia buat lagi?
>
> A: Dia telah serahkan telefon dia pada saya dan minta saya telefon isteri saya. Saya masih lagi berkeadaan diikat iaitu tangan diikat di hadapan (saksi tunjukkan). Saya telefon isteri saya dalam keadaan tangan terikat. Saya telah membuat panggilan kepada isteri beberapa kali tetapi setelah deringan 6 atau 7 kali baru isteri menjawab ...

PW9 was subsequently released by the second appellant. He went back to his car together with the second appellant to go to his office and do the needful to pay the said RM20,000 to the second appellant.

[13] Meanwhile at about 3pm on the day of the incident (12 April 2010), PW8 received a telephone call from his employee, PW10 (Yeoh Choon Wan), informing her that a male Malay had telephoned the office looking for PW9 and when told that PW9 was not around, the caller asked for PW8's telephone number. PW8 then permitted PW10 to give her telephone number to the

caller. Consequent thereto PW8 received two telephone calls at about 4.30pm and 5.30pm respectively from a man with an Indonesian accent looking for PW9. PW8 told the caller that PW9 has yet to return home. In fact PW9 did not come home that night and failed to be contacted.

[14] At about 10.45pm on 12 April 2010, PW8 received a telephone call while driving around in town in her car searching for PW9. She testified that the caller said, at p 64, *Jld* 1, *RR*:

> Suami awak jahat. Hantar saya wang RM500,000.00. Sekarang dia sudah ditangkap dan ada dalam tangan saya. Esok pagi saya nak itu wang RM500,000.00.
>
> ... esok pagi saya mahu itu wang RM500,000.00. Tidak boleh repot polis. Jangan cakap sesiapa kalau you cakap siapa-siapa, saya kasi mati.

[15] However, she managed to reduce the demand to RM300,000 after negotiating with the caller the next day (13 April 2010). She managed to borrow RM50,000 from PW7 (Chua Hee), RM70,000 from PW9's elder sister, Gun Bee Choo, and RM180,000 from her own personal account and Gun Brothers Construction's account. Additionally, she lodged a police report (exh P66) upon the advice of her friends, S Waran and David. She surrendered the entire sum to the police for marking purposes.

[16] Subsequently PW8 received a telephone call from the same caller instructing her to go and wait at Ayer Keroh Toll Station for the delivery of the said sum. At the said toll station, PW8 received yet another telephone call from the same caller, now directing her to enter the Highway and proceed towards Kuala Lumpur. She was also told not to switch off her telephone. She was asked to stop at Point 196 along the Highway. Upon arrival at Point 196, PW8 was instructed to throw the money down (ke bawah) the highway. She refused to comply as she did not see anybody down there and instead demanded to speak to her husband, PW9. Her request was ignored though and the caller ended their conversation.

[17] However, while waiting for the caller to call back, she received a telephone call from PW9 through her second handphone. This was at about 6pm PW9 told her not to deliver the said sum as demanded as he has been released by the second appellant. She was also told to come back to their office (at No 29, Jalan MJ58, Taman Merdeka Jaya, Melaka) with the said sum. She went back and upon arrival at Jalan MJ59, she saw PW9's car. She stopped her car and saw PW9 with an Indonesian inside PW9's car when PW9 also stopped his car. She identified the said Indonesian as the second appellant.

[18] PW9 then requested RM25,000 from PW8, to be given to the second appellant in return for his release as promised. However, PW8 mistakenly gave RM40,000 to PW9. The said sum was placed inside a yellow plastic bag.

[19] PW9 thereafter proceeded to send the second appellant to Jalan Bunga Raya. Nevertheless as his vehicle entered Jalan Bunga Raya, his path of way was obstructed and ordered to stop by the police. The second appellant was promptly arrested by PW22 when he alighted from PW9's vehicle together with the said RM40,000.

[20] The third appellant was arrested by ASP Zulfikar on 14 April 2010 at about 1.35am vide Banda Hilir Report 2355/10 and was handed to the investigating officer ('IO') of the case, PW28 (ASP Zabidi bin Kadir Mohamad), at about 3am on the same day. Meanwhile the first appellant was also arrested by the same officer at about 1.45am on 14 April 2010 vide Bandar Hilir Report 2656/2010 and was handed to PW28 also on the same day at about 3.25am. Their arrests were based upon the information supplied by the second appellant.

[21] In an identification parade held on 22 April 2010, PW9 was able to identify all the three appellants and PW8 managed to identify the second appellant.

FINDINGS OF THE TRIAL JUDGE AT THE END OF PROSECUTION CASE

[22] The learned trial judge found that the prosecution had indeed proven each and every ingredient of the offence as proffered, to wit, that PW9 was wrongfully confined; that the wrongful confinement was committed with intent for ransom; that there was a demand for the ransom sum; that the three appellants were the persons who had wrongfully confined PW9 with intent for ransom; and that the three appellants had committed the said acts in furtherance of the common intention of all under s 34 of the Penal Code ('the PC'). The learned trial judge found that the prosecution had established a prima facie case against the three appellants and ordered the three appellants to enter their defence.

[23] On the facts and evidence, we were on all fours with the aforesaid findings of he learned judge.

THE DEFENCE OF THE APPELLANTS

[24] The three appellants testified on oath and in brevity the following are their defence:

[25] The three appellants said they are Indonesian nationals and had come to Malaysia to seek employment. The second appellant had known one Ah Thiam for about a month and the third appellant for about two months before the date of the incident. He did not know the first appellant at all prior to the incident. The third appellant also did not know the first appellant and he was introduced to him by Ah Thiam in a restaurant at Semabok. The third appellant had known Ah Thiam for more than a year and had previously worked as his employee. Meanwhile the first appellant had known Ah Thiam as a friend for at least five or six months prior to his arrest.

[26] The three appellants testified that they were contacted by Ah Thiam and were hired and paid to assault PW9, a total stranger, on account that PW9 had borrowed money from Ah Thiam and had refused to pay the borrowed sum.

[27] The second appellant admitted that he had assaulted, bound and confined PW9 at the said abandoned building and had also stood guard over PW9 as alleged by PW9. He did it for the money and also to assist Ah Thiam.

[28] The third appellant admitted that he was the caller who had called PW9, and took PW9 to the abandoned building and had further assaulted, bound and confined PW9 at the said abandoned building.

[29] The first appellant also admitted that he had, together with the second and third appellant, assaulted, bound and confined PW9 at the said abandoned building on the day in question.

[30] However, all the three appellants denied knowing PW9 or his family; had denied knowing PW9's telephone number or his family's or the telephone number of PW9's firm; denied calling PW9's office/firm to get PW8's telephone number; denied calling PW8 to enquire PW9's whereabouts; denied calling PW8 for the ransom sum of RM500,000 in lieu of PW9's release; and denied they had planned PW9's kidnapping with intent to obtain ransom.

[31] The three appellants further testified that the initial instruction given by Ah Thiam was only to assault PW9. The other instructions other than the instruction to assault, were given by Ah Thiam at the spur of the moment (*secara tiba-tiba*). The three appellants also said that at all times they did not know that Ah Thiam had demanded RM500,000 from PW8.

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[32] The learned trial judge found that the defence posited by the appellants were mere attempts to shift the entire culpability upon Ah Thiam (the IO

testified that Ah Thiam's real name is Koh Chun Seng) and further found no evidence to implicate Ah Thiam with the commission of the offence. The defence of the three appellants were devoid of any merit. The learned trial judge equally found that the defence were mere concoctions and outright denials. The three appellants had failed to raise a reasonable doubt upon the prosecution's case and that the prosecution had proved its case beyond a reasonable doubt. Consequently the three appellants were found guilty and convicted of the offence as proferred against them.

THE APPEAL BEFORE US

[33] The learned counsel submitted two grounds of appeal:

(a) the three appellants did not wrongfully confine PW9 with intent for ransom; and

(b) the learned judge did not consider the existence of a certain male with an Indonesian accent who had called PW8 demanding the ransom sum.

OUR DECISION

First ground

[34] It was learned counsel's submission that there is no evidence suggesting that the ransom sum of the RM500,000 which was later reduced to RM300,000 was demanded by the appellants or any one of them. It was further submitted that PW28 ('the IO') agreed that the handphones seized from the three appellants did not show that the same were used to call PW8 to demand the said ransom sum. On the other hand the telephone number 0176496807 registered on PW8's handphone when the demand for the ransom sum was made, was according to PW28's investigation, registered under Sularo's name, also an Indonesian. PW28 confirmed that his investigation with the Immigration Department showed that this person had indeed entered Malaysia but there is no record of him exiting the country. According to the appellants, they did not know Sularo and were only hired by Ah Thiam to assault PW9.

[35] We were of the view that if the intention of the appellants were only to assault PW9 as instructed by their paymaster, then there is no need for them to wrongfully confined PW9 at an abandoned building after assaulting PW9, which was then followed with a ransom demand to PW9's wife, PW8, to secure PW9's release. They should just leave or allow PW9 to go after they have done with PW9. However, the appellants proceeded to bound PW9's hands and feet and further plastered PW9's mouth and eyes. PW9 was next dragged into the

toilet and the second appellant was assigned to stand guard over PW9 throughout his wrongful confinement until his release by the second appellant the next evening at about 6pm.

[36] It is apparent that from the very beginning, the conduct of the three appellants do not suggest that they were merely on a hired mission to assault PW9.

[37] The three appellants were charged with common intention under s 34 of the Penal Code ('the PC') to commit the crime. The section is intended to make a person liable for the commission of an offence not committed by him, but by another person with whom he shared the common intention. It is also to deal with cases in which it is difficult to prove exactly what part was played by each of them in the commission of the offence or in cases where it is difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all – see *Hari Ram v State of Uttar Pradesh* (2004) 3 LRI 523 (SC).

[38] The learned judge found that each of the appellants had played their role in the execution of their plan to abduct, to wrongfully confine, to demand the ransom sum, denoting that they were indeed acting in concert in furtherance of the common intention of all. This much was alluded to by the learned trial judge where at pp 553–554 of *Jld III*, *RR*, the learned judge had found:

> 19. Niat bersama kesemua OKT jelas dapat dilihat daripada keterangan berikut:
>
> (a) SP9 telah diperdaya oleh OKT2 (third appellant) untuk datang ke bangunan terbengkalai yang dikatakan sebagai tapak projek majikannya dan naik ke tingkat atas untuk melihat pelan lukisan;
>
> (b) sampai di tingkat atas OKT2 (third appellant) telah mengepung tangga di belakang SP9 dan memegang kayu. Pada masa yang sama OKT1 (second appellant) dan OKT2 (the evidence showed OKT3 (first appellant)) pun muncul dari arah berlainan menuju kepada SP9 dengan bersenjatakan kayu;
>
> (c) kesemua OKT kemudiannya telah menyerang dan mencederakan SP9 di bahagian kepala, kaki, tangan dan belakang badan. SP9 lantaran pukulan itu telah jatuh ke lantai;
>
> (d) kesemua OKT seterusnya mengikat tangan, kaki dan menutup mulut dan mata SP9 dengan pita pelekat. SP9 seterusnya dikurung dan ditahan di bangunan itu sehingga dia dilepaskan oleh OKT1 (second appellant) keesokan petangnya; dan
>
> (e) semasa merunding bagi pelepasannya, SP9 telah bercakap dengan OKT1 dan OKT1 (second appellant) telah memaklumkan bahawa jika isteri SP9 membuat pembayaran dia akan dilepas; jumlah tebusan

ialah RM500,000; semasa menawarkan wang bagi pembebasannya, OKT1 (second appellant) mengatakan dia perlu memastikan berapa jumlah rakan kongsinya dapat daripada keluarga SP9 terlebih dahulu; OKT1 (second appellant) memaklumkan jika rakan kongsinya tidak memberi bahagiannya, dia akan menerima tawarannya.

[39] We were entirely with the learned trial judge in respect of his analysis of the evidence and the determination that the three appellants had indeed participated and were acting in concert in furtherance of their common intention, to wit, the wrongful confinement of PW9 with intent for ransom. The second appellant while guarding PW9 knew that his partners had demanded RM500,000 ransom sum from PW9's wife. There can be no doubt that there must be some communication between the second appellant and his partners and there can be no doubt that his partners were none other but the two other appellants.

[40] When PW9 offered the second appellant RM20,000 which was later increased to RM80,000 for his release, he was told by the second appellant to wait as the second appellant wanted to know first how much his partners are going to give his fair share. Finally the second appellant told PW9 that if his partners are not going to give his fair share, he is going to accept PW9's offer of cash in lieu of his release.

[41] These evidence by PW9 was never really challenged by the defence. It is hence apparent that at the material time of PW9's wrongful confinement, the second appellant's two other partners were actively demanding the ransom sum from PW8, and equally, actively making and executing the plan for the delivery of the said ransom sum to them. This is the only inference that could be had in all the circumstances of the case.

[42] Clearly, there was a demand for the ransom sum made by the appellants who had acted in concert pursuant to a prearranged plan in furtherance of the common intention of all within the four walls of s 34 of the PC. The section makes a person(s) liable for action of an offence not committed by him but by another person with whom he shared the common intention. Sularo's role was not even alluded by the appellants in their defence. On the facts and evidence, we were satisfied that the prosecution had established that there was a prearranged plan to commit the said offence and the said offence was done in concert pursuant to that prearranged plan. The conduct of the second appellant put to rest learned counsel's submission that there is no evidence that the ransom sum was demanded by the appellants.

The second ground

[43] Learned counsel submitted that the telephone that was used to call PW8 to demand the ransom sum was registered under Sularo's name, an Indonesian national. Going by the testimony of PW28 that Sularo is a real person who had entered Malaysia and has not exited, it was submitted that there is the possibility that Sularo was the person who had demanded the said ransom sum. However, apart from confirming with the Immigration Department of Sularo's entry into the country, there was no further investigation made upon Sularo. Equally no attempt was initiated to locate Sularo.

[44] Learned counsel hence submitted that the learned judge had erred in not taking into account PW28's testimony relating to the existence of the said Sularo. Additionally, the failure of the prosecution to locate Sularo or produced Sularo in court is fatal and the learned judge should have invoked the adverse inference rule under s 114 Illustration (g) of the Evidence Act 1950, to operate against the prosecution for their failure to call Sularo.

[45] The applicability of s 114 in a given set of circumstances has been truly settled by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, where Mohamed Azmi SCJ, speaking for the court, stated at p 494:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not only on account of failure to obtain evidence, It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witnesses but an important and material witness to the case.

[46] Now, PW28 has only the said telephone number and the entry of an Indonesian by the name of Sularo into the country. There were no other particulars available at hand. Even the appellants did not allude to the existence/presence of the said Sularo in the narratives of their defence. In such event, PW28 is not expected to go on a merry-go-round looking for Sularo in the absence of further particulars relevant to his investigation.

[47] Hence, it seems to us that under the circumstances, the prosecution was never in position to procure Sularo's attendance in court. In our judgment the non-production of Sularo by the prosecution was not deliberate or unfairly kept back but on account of the failure to locate and subpoena him. It is not as a result of withholding or suppression of evidence in terms as stated by the Supreme Court in *Munusamy v Public Prosecutor*. Such failure is no justification to warrant the invocation of s 114 Illustration (g) to operate adversely against the prosecution.

[48] It is equally apparent that the prosecution's case was grounded entirely upon the testimonies of PW8 and PW9. In law, all they need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. It is apparent that Sularo is neither material nor essential for the prosecution to unfold its narrative and establish its case. As long as PW8 and PW9 are able to give evidence of the transaction, to wit, the wrongful confinement of PW9 with intent for ransom, where we were in full agreement with the learned trial judge's findings that the prosecution had so established, there is absolutely no reason why Sularo should be called nor why any presumption should be invoked that his evidence, if produced, would have been against the prosecution.

[49] Additionally, there is PW28's unchallenged testimony that his investigation had revealed that the telephone calls to PW8 demanding the said ransom sum were in fact made by the first appellant. We were most inclin to agree with the learned deputy public prosecutor ('DPP') that in most cases of this nature, more than one telephone are usually employed in their modus operandi. The three appellants are illegal immigrants. They came without documents. We were again with the learned DPP that in such event they could have used any name to enter the country and register their telephones.

[50] In regard to the role of Ah Thiam (Koh Chun Seng) alluded to by the appellants in their defence, the factual findings of the learned trial judge at the end of the prosecution's case is most pertinent. At pp 554–555, *Jld* 111, *RR*, the learned judge found:

> Pembelaan juga telah menimbulkan isu bahawa perancang utama semua ini ialah seorang yang bernama Ah Thiam atau Koh Chun Seng. Walaupun SP-28 bersetuju kewujudan Koh Chun Seng ini, namun tiada apa-apa keterangan kukuh untuk melibatkannya dengan kesalahan yang dipertuduhkan ke atas ketiga-tiga OKT di sini. Tiada keterangan, sama ada langsung atau sebaliknya, yang pemanggil meminta wang tebusan RM500,000 datangnya dari Kok Chun Seng. Cadangan pembelaan itu tidak munasabah. Cadangan bahawa SP9 mengenali Koh Chun Seng dan hakikat ini menjadi motif untuk menculik SP9 berbanding dengan kesemua OKT yang tidak mengenali SP9, amat liar sekali dan tidak berasas. Amat tidak munasabah untuk dijadikan sebagai saranan atau unsur kesalahan ini bagi seseorang tertuduh itu mengenali orang yang hendak diculiknya ...

At the end of the defence's case, the learned judge, at pp 558–559 of the same *Jld*, subscribed:

> Apa yang jelas kesemua pembelaan OKT merupakan cubaan untuk mengalihkan kesalahan ini kepada Ah Thiam atau Koh Chun Seng. Dalam hal ini saya bersetuju dengan penghujahan pihak pendakwaan. Tiada apa-apa keterangan untuk mengaitkan Koh Chun Seng dengan kejadian dalam kes ini. Saya masih berpegang

kepada penemuan saya di akhir kes pendakwaan. Saya berpendapat pembelaan yang ditimbulkan adalah tidak bermerit dan lebih merupakan satu rekaan dan penafian am ...

[51] We were in full agreement with the aforesaid factual findings of the learned judge. His findings were amply support by the facts and evidence adduced. Verily, there is no reason for us to disturb the said findings. Additionally, the evidence revealed that Ah Thiam was implicated only in the assault of PW9 and nothing more.

CONCLUSION

[52] For all the reasons given, we find no real substance in these appeals to merit our intervention. The appeals against the convictions are dismissed and the sentences handed down by the High Court are affirmed.

Appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar